

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY

Tekstrom, Inc.,	:	C.A. No. 03-06-0033
A Delaware Corporation,	:	
	:	
Plaintiff/Counterdefendant,	:	
	:	
vs.	:	
	:	
Sameer K. Savla,	:	
	:	
Defendant/Counterclaimant,	:	
	:	
vs.	:	
	:	
Charan Minhas,	:	
	:	
Individually,	:	
Counterdefendant.	:	

**Decision After Trial**

**Trial: May 2, 2005**

**Oral Argument: July 20, 2005**

**Submitted: September 9, 2005**

**Decided: September 9, 2005**

**Judgment is entered in behalf of Savla  
and against Tekstrom and Minhas.**

Thad J. Bracegirdle, Esquire, Buchanan Ingersoll, PC, The Nemours Building, 1007 North Orange Street, Suite 1110, Wilmington, Delaware 19801, Attorney for Plaintiff/counterdefendant and Defendant.

John S. Grady, Esquire, Grady & Hampton, LLC, 6 North Bradford Street, Dover, Delaware 19901, Attorney for Defendant/Counterclaimant.

Trader, J.

In this civil action, Tekstrom has filed a claim for breach of contract against Sameer Savla (Savla) and requests liquidated damages in the amount of \$19,397.24. Savla has filed a counterclaim against Tekstrom and Charan Minhas (Minhas) for (1) breach of the covenant of good faith and fair dealing; (2) false representation of the employment contract; (3) intentional infliction of emotional distress; (4) violation of the federal Fair Labor Standards Act and violation of the Delaware wage and labor laws; and (5) discrimination on the basis of alienage in violation of 42 U.S.C. Sec. 1981. I hold that Tekstrom cannot recover on its claim for breach of contract because of material misrepresentations made by Minhas and relied upon by Savla. I further hold that Tekstrom and Minhas violated 19 Del.C. Section 902 and that Savla may recover from Tekstrom and Minhas lost wages as well as liquidated damages. Additionally, Savla is entitled to compensatory and punitive damages against Tekstrom and Minhas because they committed the tort of intentional misrepresentation of the employment contract and violated the covenant of fair dealing. I also hold that Savla is entitled to compensatory and punitive damages against Minhas and Tekstrom because of their outrageous conduct that intentionally or recklessly caused severe emotional distress to Savla. I also hold that Savla cannot prevail on his Section 1981 claim against Minhas and Tekstrom because of alienage discrimination. The claim on the basis of promissory estoppel was previously abandoned by Savla.

After a careful consideration of the evidence, I accept the testimony of Savla and reject the testimony of Minhas and Tekstrom's other witnesses.

I find that the relevant facts are as follows: Savla is a twenty-six year old man from India who came to America in August of 2000 on a student visa. He graduated with a master's degree from the University of Houston in December 2002.

In December 2002, Tekstrom sent an email to the Indian Student Association for the University of Houston at Deer Lake, Texas. The email recited that Tekstrom had job openings and would process an H1-B visa quickly. The email had a link to Tekstrom's website and the website represented that Tekstrom had Fortune 500 companies as clients.

In response to this email, Savla sent his resume by email to Tekstrom and a few days later, Minhas, the vice president of the company, contacted Savla by telephone and interviewed him about his qualifications. Although Minhas testified that he had no recollection of the conversation, Savla testified that he was told that Tekstrom had job openings and would process the H1-B visa immediately. He was informed about a training period and was told that after the training period, he would begin working immediately. Two or three days later, Minhas called Savla and offered him an employment position and Savla was told to report to Dover, Delaware on or about January 17, 2003.

Savla traveled to Dover at his own expense and arrived in Dover around January 18, 2003. The next day, Minhas presented Savla and five other people in the training group with a contract. All of the people in the training group were aliens and needed a visa.

Before the contract was signed, Minhas had a conversation with each of the persons concerning the contract. Each of the applicants in the group had questions about

health insurance, but Minhas indicated that health insurance would start immediately. Although the contract provided that the company would not pay for any expenses concerning the visa, Minhas promised to obtain a visa for Savla. After Savla brought this matter to Minhas's attention, this language was stricken from paragraph 11 of the contract.

Both Savla and Ms. Dharani, another member of the training group, were told that the training would be for three weeks, and that after that time they would be absorbed into ongoing projects. Each person in the training group was under the impression that when the contract was signed, he or she would receive a job.

A few days after the signing of the contract, the alleged training began. Mr. Mokkarala, an employee of Tekstrom, would call at night and give instructions to the trainees from 7 to 9 p.m. Mr. Mokkarala was working full time during the day. There were no books or manuals provided to the trainees and the only instruction manuals that were available came from the software. Since Savla had a master's degree in computer science, he found that the training was unnecessary. The employees were required to be in the office every day and every night during the so-called training period. Minhas testified in prior testimony and at trial that if the trainee started the training and left the company, that he or she would owe Tekstrom \$18,000.

During this time in Dover, Savla stayed in an apartment in Dover Country Club Apartments. There was only one bed in this apartment and this bed was shared by two female employees who were participating in the training program. Savla slept on the floor in a sleeping bag provided by Tekstrom. Savla had been told that he would be

provided with comfortable one-bedroom-per-person housing, but he stayed in the apartment under the above conditions for four months.

After the training was completed, the group was told that they were not going to be absorbed into ongoing group projects. Savla and Dharani asked Minhas about their pay, health insurance and visas, and they again received assurances from Minhas, but Tekstrom and Minhas never provided these items. Savla did not have any work experience, but Tekstrom provided him with a false resume which he was to use in order to find a job placement.

In April 2003, Dharani left Dover and returned home. Minhas told Savla that if he tried to leave like Dharani he would make an example out of him.

In late April 2003, Savla was contacted by Nirmal Ramaswamy of Aria Consulting, who was trying to fill a position for a vendor. Savla informed Ms. Ramaswamy that she should contact Tekstrom directly and negotiate a contract. Thereafter, Tekstrom negotiated a contract with Ms. Ramaswamy so that Savla could begin working at Bearing Point, New York. Before Savla left for New York, Minhas bought him a laptop computer at Sam's Club, but he did not provide him with any software. During his time in Dover, Savla was not paid by Tekstrom.

Savla began working at Bearing Point on May 5, 2003, and he worked at that client site project until May 23, 2003. On Friday, May 5, 2003, Savla sent an email to Minhas that requested information concerning his pay. On May 16, 2003, Savla again sent an email to Minhas and requested information concerning his pay and also told him that he was having problems with the laptop. Minhas told Savla in a telephone

conversation that Savla needed to come to Delaware to return the laptop. Savla gave the laptop to a friend and requested that he mail it to Tekstrom.

In a telephone call on either May 18 or 19, 2003, Minhas told Savla to quit, but Savla was also told that if he quit he would be sued. Savla questioned Minhas about his pay, his visa and other problems that he was having with Tekstrom, but received no satisfactory answers. Savla was under a lot of stress at Bearing Point and he indicated that he was not feeling well.

On May 18 or 19, 2003, Minhas wrote to Savla and requested that he provide Tekstrom with the address of Dharani because Tekstrom wanted to file a lawsuit against her. On May 23, 2003, Ms. Ramaswamy wrote to Satish Dola, president of Tekstrom, and requested a copy of Savla's H1-B visa, recent pay stubs, and a copy of the contract. On or about May 23, 2003, Satish Dola wrote Ms. Ramaswamy stating that they were going ahead with the lawsuit against Savla and filing criminal charges for theft. Minhas ordered Savla to come to Dover personally by May 27 in order "to report to us and account for all of your actions and misactions, failing which we will start our legal course." On May 23, 2003, Savla was so upset over the threats that he became sick to his stomach and testified that he really felt sick. He returned to Houston on that date to live with his fiancée.

On May 28, 2003, Stuti Vora, Savla's fiancée, sent an email to Minhas informing him that Savla was in bad health and that the shipment of the laptop was in the Delaware Fed Ex office. In response to this email, Minhas threatened Savla with a civil lawsuit, criminal charges, possible deportation, and the destruction of his career. Minhas again ordered Savla to appear personally in Dover because he questioned whether or not Savla

was sick. He further stated that a criminal complaint had been prepared and they were holding back from filing it as it could lead to his deportation and he may never be able to come back here. Minhas ended the email by promising to make good on all of their threats.

On June 2, 2003, Savla responded to the email and said that he had sent the laptop to Dover, but Satish Dola had refused it. He also informed Minhas that he was in Houston and would not be working anywhere else. He further told Minhas that he had been very sick the last ten days.

On June 10, 2003, Tekstrom filed a complaint against Savla seeking damages in the amount of \$19,397.24. Thereafter, Savla filed his counterclaim against Tekstrom and Minhas. At trial, Tekstrom abandoned its claim for conversion of the lap top computer and thereby reduced its claim to \$18,000.00.

### **Tekstrom's Cause of Action for Breach of Contract**

Tekstrom contends that Savla is obligated to pay a liquidated damage claim in the amount of \$1000.00 for each month that Savla did not work for Tekstrom. I disagree.

Savla signed a contract based on false representations made by Minhas and the misrepresentations were material to the contract. Savla was told that he would receive top training in a classroom setting and that he would be receiving pay, a visa and health insurance benefits. Since neither Minhas nor Tekstrom provided any of these items, Savla was falsely induced to sign a employment contract.

Misrepresentation is an affirmative defense to a breach of contract. *Alabi v. DHL Airways*, 583 A.2d 1358, 1361 (Del. Super. 1990).

*The Restatement of Contracts* establishes the elements to find that a contract is voidable. Section 164 provides, “[i]f a party’s manifestation of assent is induced by either a fraudulent or material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.” Thus, the contract is voidable at the option of Savla. *Restatement (Second) of Contracts* Sec. 164 (1981).

Additionally, paragraph 13 of the contract is void as a matter of public policy because it is a penalty. Under the contract, “applicant agrees to pay \$1,000 for each month less served as a paid employee of the company.” According to Delaware case law, “[t]he question of whether a clause represents liquidated damages or is a penalty is a question of law.” *Montague v. Seacoast Realty, Inc.*, 2003 WL 22787611, at \*6 (Del. Super. Oct. 3, 2003). In *Montague*, the court stated that if a clause is only intended to punish the defaulting party, then the “clause is void as against public policy and recovery will be limited to actual damages.” *Id.*

In *S & H Deliveries v. Tristate Courier & Carriage*, 1997 WL 817883, at \*2 (Del. Super. May 21, 1997), the court set forth a two-part test to determine whether a provision for liquidated damages is valid. Such a provision is valid when: (1) the damages which the parties may reasonably anticipate are difficult to ascertain (at the time of contracting) because of their indefiniteness or uncertainty; and (2) the amount stipulated is either a reasonable estimate of the damages which would probably be caused by the breach or is reasonably proportionate to the damages which have actually been caused by the breach.

In the case before me, Minhas’s testimony about the uncertainty of the damages is not credible. In Tekstrom’s 2003 Federal Income Tax Return, \$500.00 is allocated to



training and seminars. Additionally, Tekstrom's expenses related to housing and meals provided to trainees are readily ascertainable. Therefore, calculating any damages from a breach of Tekstrom's contract is not difficult, indefinite, or uncertain. Finally, the stipulated amount of \$18,000.00 is not a reasonable estimate of the damages which could be caused by the breach, nor is it reasonably proportionate to the damages which could be caused by the breach. For example, under this liquidated damages provision, an employee who leaves the company the day after signing the contract would be expected to pay the same amount of damages as Savla.

Based on the above cited analysis, Tekstrom cannot recover from Savla on its claim for damages.

**Savla's Claim Under the Federal Labor Standards Act**  
**29 U.S.C. Sec. 206 and 19 Del.C. Sec. 902**

Savla has alleged a claim under 19 Del.C. Sec. 902. Tekstrom and Minhas contend that Savla cannot proceed under state law. I disagree. It is true that the FLSA will preempt any state laws that drops below the FLSA baseline. *Gaskins v. Marshall Craft Assoc.*, 678 A.2d 615, 620 (Md. Ct. Spec. App. 1996). But here, Delaware law provides for an hourly rate of \$6.15, which is in excess of the federal standard of \$5.15 per hour.

Courts have held minimum wages cannot be waived by contract. *Chellen v. John Pickle Co.*, 344 F.Supp. 2d 1278, 1292 (N.D. Okla. 2004). Employers and employees are free to contract for any terms they choose as long as they comply with FLSA. 48A. Am. Jur. 2d *Labor and Labor Relations* Section 3813 (2005).

In *Chellen*, the company brought 52 non-citizens from India to work as welders for the company. The company required the workers to sign agreements and provided

inadequate housing. The defendant company asserted that the welders were trainees, but the *Chellen* court found that the Indians were employees. *Id.*

Although few cases have dealt with the rights of trainees, the test of whether an employment relationship exists is one of economic reality considering all of the circumstances of the activity. *Bailey v. Pilot's Ass'n.*, 406 F.Supp. 1302, 1306 (citing *Goldberg v. Whitaker House Co-Op, Inc.* 366 U.S. 28, 33 (E.D. Pa. 1976)).

In *Martin v. Albrecht*, 802 F. Supp. 1311, 1313 (W.D. Pa. 1992) the court outlined six factors in determining whether a person is a employee. These factors are: (1) the degree of the alleged employer's right to control the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; and (6) whether the service rendered is an integral part of the alleged employer's business.

Applying these factors to this particular case, it should be noted that Tekstrom and Minhas had a right to control what work was done. Secondly, Mr. Savla had a master's degree in computer science from the University of Houston at Clear Lake, Texas. Thirdly, there was a degree of permanence in the working relationship since Tekstrom and Minhas expected Savla to work for at least eighteen months. Lastly, Tekstrom is a broker for computer software specialists and it is an integral part of their business to obtain employment for persons with the qualifications of Savla.

In the case before me, Savla signed a contract on January 22, 2003 and in connection with this contract, a training program was commenced for three weeks. The

question in this case was when did Savla and the others in the training group become employed. Although there is evidence that he was an employee from the time of the signing of the contract, based on Savla's testimony, I conclude that he was employed at the conclusion of the three-week training program.

Since Savla was not paid during his employment by Tekstrom, he is entitled to damages for his lost wages against Tekstrom as well as liquidated damages for the amount of unpaid wages.

Tekstrom and Minhas contend that Savla was a trainee rather than an employee. I disagree. It is true that the United States Supreme Court noted in *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947), that the definition of employee in FLSA was "not intended to stamp all persons as employees who . . . might work for their own advantage on the premises of another." But whether an employment relationship exists is one of economic reality, considering all circumstances of the activity. *Martin*, 802 F.Supp. at 1313 (citing *Donovan v. Dial America Marketing*, 757 F.2d 11376, 1382 (3d Cir. 1985)).

Minhas and Tekstrom cite *Donovan v. American Airlines*, 686 F.2d 267 (5<sup>th</sup> Cir. 1982) as authority for the proposition that Savla is a trainee. I hold that *Donovan* is inapposite. In *Donovan*, persons went to Dallas, Texas to be trained as flight attendants and sales agents for American Airlines (AA), and AA did not guarantee employment if the person qualified. Training was four or five weeks and the trainees received free food and lodging during the training period. The *Donovan* court held that trainees were not employees for FSLA purposes. *Id.* at 272. The above case is distinguishable from the case at bar because Savla was promised employment if he came to Dover, Delaware.

Tekstrom and Minhas also contend that they provided benefits in terms of training, food, and lodging to satisfy the minimum wage requirements of FLSA or 19 Del.C. Sec. 902. The defendants' contention is incorrect. 29 U.S.C. Sec. 203(m) allows the employer to include the reasonable cost of servicing meals, lodging, or other facilities in employee wages for the purposes of the FLSA. The employer bears the burden of showing that it is entitled to the credits claimed under Sec. 203 (m). *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 474 (11<sup>th</sup> Cir. 1982). Additionally, the employer is required by 29 C.F.R. Sec. 516.27 to keep records of the cost of providing meals and lodging. *Id.* at 475.

Neither Tekstrom nor Minhas presented any evidence at trial that training, food, or housing constitute a substitute for wages. Tax records were not introduced to show that these items were in lieu of wages. Additionally, Savla was promised food, lodging and training in addition to employment. The training that was offered consisted of telephone conversations with another Tekstrom employee from Florida at night. The defendants never provided any training manuals or outlines. I conclude that the training was inadequate and not a reasonable substitute for wages under the FLSA. In regard to the housing, Savla slept in a sleeping bag in an apartment with two other persons. I conclude that any non-monetary compensation provided by defendants to Salva was inadequate and unreasonable, and not what was promised to him. Hence, neither the training, housing, or meals satisfy the minimum wage requirements of FLSA or 19 Del.C. Sec. 902.

I also hold that Minhas can be personally liable for the violation of the Federal Labor Standards Act and the Delaware Wage and Labor Law.

The fact that the individual defendants in the instant case were employees of the corporate ‘employer’ does not insulate them from potential liability, because the ‘overwhelming weight of authority is that a corporate officer with operational control of a corporation’s covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages.’

*Sandom v. Traveler's Mortgage Servs. Inc.*, 752 F.Supp. 1240,1251 (D.N.J. 1990) (citing *Donovan v. Agnew*, 712 F.2d 1509, 1511 (1<sup>st</sup> Cir. 1983)).

It is stated in *Fletcher Cyclopedia of the Law of Private Corporations* that an individual who controls corporate operations and the terms and conditions of employee’s employment is an employer under the Act. 3A *Fletcher Cyclopedia of Private Corp.* Sec. 1135 (2004).

Minhas was in charge of recruitment and personally hired Savla, and at that time was in charge of the operation of the company. He was the one who threatened Savla with the lawsuit if he left the company, and there is evidence that Minhas conducted the day to day operations of Tekstrom. Minhas’s testimony that he lacked operational control over the company is not credible. Under these circumstances, Minhas is personally liable for the unpaid wages and liquidated damages owed to Savla.

### **Breach of Covenant of Good Faith and Fair Dealing**

The Delaware Supreme Court has ruled that every employment contract includes the implied covenant of good faith and fair dealing. *Merrill v. Crothall-American*, 606 A.2d 96 (Del. 1992). To prove an employer has breached the implied covenant of good faith and fair dealing, the Court held that “the conduct of the employer must constitute ‘an aspect of fraud, deceit or misrepresentation.’” *Id.* at 101. The court stated “[t]he lodestar here is candor. An employer acts in bad faith when it induces another to enter

into an employment contract through actions, words, or the withholding of information, which is intentionally deceptive in some way material to the contract.” *Id.* It is clear that Tekstrom and Minhas made false material representations to Savla to induce him to sign an employment contract. They represented that they would take immediate steps to obtain an H1-B visa, but they never obtained a visa for him. They promised medical benefits which were not provided.

It was held in *Hudson v. Wesley College*, 1994 WL 469138 (Del. Ch. Aug. 1, 1994), that a cause of action for a breach of covenant of good faith and fair dealing may be brought against the president of the college as well as the college. In *Schuster v. Derocili*, 775 A.2d 1029 (Del. 2001), the Delaware Supreme Court permitted a cause of action to go forward against a president of a company for a breach of covenant of good faith and fair dealing. In this case, Minhas is the vice president rather than the president of the company, but in *E.I. DuPont de Nemours v. Pressman*, 679 A.2d 436 (Del. 1996), the court held that a supervisor of the defendant company could be held liable for a breach of covenant of fair dealing. Under these circumstances, Savla prevails on his cause of action for breach of covenant of fair dealing against Minhas and Tekstrom.

#### **Savla’s Cause of Action for False Representation of the Employment Contract**

The elements of a claim of fraud in Delaware are as follows: (1) a false representation, usually one of fact, made by the defendant; (2) the defendant’s knowledge or belief that the representation was false, or was made with reckless indifference to the truth; (3) an intent to induce the plaintiff to act or to refrain from acting; (4) the plaintiff’s action or inaction taken in justifiable reliance upon the representation; and (5) damage to the plaintiff as a result of such reliance. *Lord v. Souder*, 748 A.2d 393, 402 (Del. 2000).

In the case before me, Minhas and Tekstrom made many false representations to Savla. These false representations include: (1) Tekstrom and Minhas represented that Tekstrom had Fortune 500 companies as corporate clients; (2) Tekstrom and Minhas represented that Savla would be absorbed into ongoing projects with their company; (3) Tekstrom and Minhas represented that they would process his H1-B visa application immediately and sponsor him; (4) Tekstrom and Minhas represented that they would provide health benefits immediately; and (5) Tekstrom stated it would provide clean, single living accommodations during training. All of the above representations were false.

Tekstrom and Minhas contend that a false representation must be established by clear and convincing evidence. I disagree. In *Miller v. Falconetti*, 1993 WL 603298, at \*2 (Del. Super. Oct. 6, 1993), President Judge Ridgely, now Justice Ridgely, opined, “it is well established in Superior Court the burden of proving fraud is by a preponderance of the evidence.” Even assuming *arguendo* that clear and convincing evidence is required, I hold the intentional false representation has been established by a preponderance of the evidence.

Tekstrom and Minhas contend that Savla’s testimony is unsupported by documentary evidence. They also assert that his testimony is contrary to Minhas’s testimony concerning his habit and custom. However, I conclude that Savla’s testimony is credible and Minhas’s testimony is not believable. In making the determination, I considered the demeanor of the witness, his apparent fairness in giving his testimony, the reasonableness and unreasonableness of the testimony of the witness, the fact that the testimony of the witness has been contradicted, and the strength of the memory of the

witness. In this case, Savla has a clear recollection of what Minhas told him over the telephone. On the other hand, Minhas has no recollection of the conversation.

Additionally, Minhas gave inconsistent testimony concerning what he told the employees as to the meaning of the term “applicant” in the contract. Under these circumstances, I accept Savla’s testimony on the issue of the misrepresentations and reject Minhas’s testimony.

Tekstrom and Minhas also contend that Savla’s reliance on the false representations was unreasonable. I disagree. Despite the fact that representations are contrary to the contract that Savla signed, it is clear that he would not have come to Dover except for the promise of a job and the processing of the visa.

Under Delaware law, Minhas is individually liable for all intentional or reckless misrepresentations to Savla. Delaware provides that a corporate officer may be liable for the tort he commits. *Heronemus v. Ulrick*, 1997 WL 524127 (Del. Super. July 9, 1997). In *Heronemus*, the court stated that “corporate officers are personally liable for torts which they commit, participate in, or inspire, even though the acts are performed in the name of the corporation.” *Id.* at \*1 (citing *Vuitch v. Furr*, 482 A.2d 811, 821(D.C. 1984)). If a corporate officer was actively involved in that the officer directed, ordered, ratified, approved or consented to the tort, he could be held accountable. *Id.* at \*2. Because Minhas participated in almost all of the misrepresentations and fraud, he should bear personal liability.

### **The Claim for Intentional Infliction of Emotional Distress**

A person is liable for the tort of intentional infliction of emotion distress who, by extreme and outrageous conduct, intentionally or recklessly causes severe emotional



distress to another. *Thomas v. Harford Mut. Ins. Co.*, 2004 WL 1102362 (Del. Super. April 7, 2004) Judge Ridgely, now Justice Ridgely stated, “the Delaware Supreme Court held that a claim for intentional infliction of emotional distress may be made even in the absence of accompanying bodily harm, if the conduct is outrageous.” *Id.* at \*3.

When an employer threatens an employee with deportation, lawsuits, false criminal charges, and sabotage of his professional career, this conduct should be regarded as intolerable in a civilized community. The evidence presented at trial shows that Tekstrom and Minhas chose to threaten Savla with criminal charges, possible deportation, and destruction of his career, and as a result of this conduct, he became sick. He was vomiting, dizzy, and lost weight. Accordingly, Tekstrom is liable for the tort of intentional infliction of emotional distress. A corporate officer is personally liable for the torts he commits. *Heronemus, supra*. Therefore, Minhas is personally liable to Savla on this claim, and Savla is entitled to compensatory damages against both Tekstrom and Minhas.

**Tekstrom and Minhas did not violate 42 U.S.C. Sec. 1981**

Under this section, this court has concurrent jurisdiction with the federal courts to rule on violations of 42 U.S.C. Sec. 1981. Section 1981, which prohibits racial discrimination in the making and enforcement of contracts, provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other. 42 U.S.C. Sec. 1981(a).

To make out a claim under Section 1981, a plaintiff “must allege facts in support of the following elements: (1) [that plaintiff] is a member of a racial minority; (2) intent to discriminate on the basis of race by the defendant; and (3) discrimination concerning one or more of the activities enumerated in the statute[,] which includes the right to make and enforce contracts....” *Yelverton v. Lehman*, 1996 WL 296551, at \*7 (E.D.Pa. June 3, 1996). The Fourth Circuit has ruled that Section 1981 prohibits private alienage discrimination. *Duane v. Gov’t Employees Ins. Co.*, 37 F.3d 1036, 1043 (4<sup>th</sup> Cir. 1994). It has been held, “Because a plaintiff must show discriminatory intent, a showing that a racially neutral policy had a disparate impact will not be enough; a plaintiff must show that a defendant intentionally treated him or her differently because of her race.” *Mitchell v. DCX, Inc.* 274 F.Supp.2d. 33, 45 (D.D.C. 2003) (citing *Krodel v. Young*, 748 F.2d 701, 709 (D.C.Cir. 1984)).

While Savla is an alien from India and a member of a racial minority with the right to make and enforce contracts, I conclude that he has not shown that Tekstrom intentionally discriminated against him in violation of Section 1981. Savla did not show that he has been deprived by Tekstrom of the right to contract with the company due to his race or alienage. Nor has he shown that he was treated differently than any other group in terms of the type of contract offered to him. Although Tekstrom’s and Minhas’s conduct toward Savla was egregious, he has not made a *prima facie* case of discrimination under Section 1981. Savla has not cited any authority to support his contention that the conduct of Tekstrom and Minhas constituted actionable discrimination under Section 1981.

### **Damages Under 19 Del.C. §1103**

19 Del.C. § 1103 provides that if an employer, without any reasonable grounds for dispute, fails to pay an employee wages that are due, the employer shall, in addition to unpaid wages, be liable to the employee for liquidated damages in the amount of 10% of the unpaid wages per day or an amount equal to the unpaid wages, whichever is smaller.

In the case before me, Savla lost wages from February 15, 2003 to May 25, 2003, This is the period from the end of his training until he left his employment with Tekstrom. He was promised the pay of \$20.00 per hour for a forty-hour week and the fourteen-week claim is computed to a total of \$11,200.00.

Savla also seeks a liquidated damage award under 19 Del.C. § 1103. Since the employer failed to pay Savla wages after demand, he is entitled to liquidated damages in the amount of \$11,200.00. Neither Tekstrom nor Minhas have established any reasonable grounds to dispute the unpaid wages. It is not reasonable to rely on an invalid and illegal contract. Since Delaware law provides a more favorable remedy to Savla than what is provided under federal law, I only need to address recovery under Delaware law.

### **Compensatory Damages for Intentional Misrepresentation Violation of the Covenant of Good Faith and Fair Dealings and Intentional Infliction of Mental Distress**

It is well settled that the purpose of damage awards in civil litigation is to provide full and just compensation to a plaintiff who suffers injury or loss due to the conduct of a tortfeasor. *Maier v. Santucci*, 697 A.2d 747, 749 (Del. 1997). Because the tortfeasor has breached his duty, the injured party is entitled to damages proximately caused by the tortfeasor. *Porter v. Montgomery*, 163 F.2d 211, 215 (3<sup>d</sup> Cir. 1947). On the claims of intentional infliction of emotional distress, intentional misrepresentation, and violation of

the duty of good faith and fair dealing, Savla is entitled to be compensated for any damages to him reasonably foreseeable by Tekstrom and Minhas. Because of the conduct of Tekstrom and Minhas, Savla was unable to work for a long period of time. He could not obtain work until early January, 2001. I award him \$28,800.00 for lost wages.

### **Damages for Pain and Suffering and Mental Anguish**

Since I have determined that Savla may recover for intentional misrepresentation of the employment contract and intentional infliction of emotional distress, he should be compensated for his pain, suffering, inconvenience, and mental anguish. In this case, Savla's emotional distress was manifested by insomnia, dizziness, weight loss, and vomiting. It was compounded by the extreme financial hardship he suffered, his separation from his home and family, and the inconvenience of his having to relocate from Texas to Delaware and back to Texas. Under these circumstances, I conclude that he is entitled to \$20,000.00 as fair and just compensation for his pain and suffering and mental anguish.

### **Punitive Damages**

Savla is seeking punitive damages for the breach of the covenant of good faith and fair dealing, intentional misrepresentation, and intentional infliction of emotional distress. Under either of those legal theories, punitive damages may be awarded by the Court in the appropriate case.

The standard which governs the award of punitive damages in Delaware is well settled. In tort actions, punitive damages are appropriate in situations where the defendant's conduct has been particularly reprehensible, reckless, or motivated by malice

or fraud. *Jardel Co. v. Hughes*, 523 A.2d 518, 529 (Del.1987). In actions arising from a contract they may be assessed if the breach of contract is characterized by willfulness or malice. *Casson v. Nationwide Ins. Co.*, 455 A.2d 361, 368 (Del. Super. 1982). In either setting, the focus is upon the defendant's state of mind. If the defendant's conduct reflects a conscious indifference to a foreseeable result, punitive damages may be imposed to punish such indifference and to deter others from similar conduct. *Jardel*, 523 A.2d at 529 (Del. 1987). The extent of harm on which compensatory damages may be awarded is a significant factor in testing the proportionality of punitive damages, but punitive damages subsist on grounds other than making the plaintiff whole. *Id.* at 528. Therefore, "even though the amount of compensatory damages claimed may be deemed slight in relation to the value of the entire transaction in which the defendant's conduct was manifested, an award of punitive damages nonetheless is appropriate if the defendant's state of mind meets the applicable standard." *Littleton v. Young*, 1992 WL 21125, at \*2 (Del.Super. Jan. 2, 1992).

In this case, Minhas and Dola intentionally misrepresented the contract to Savla. Minhas and Dola deliberately threatened criminal action with potential deportation when they knew there was no real basis for doing so.

As to the claim of breach of covenant of good faith and fair dealing, the defendant committed a willful wrong in the nature of deceit and in those circumstances the court will award punitive damages under a contract. *Gillenardo v. Connor Broad. Delaware Co.*, 2002 WL 991110 (Del. Super. April 30, 2002). On the claim of intentional misrepresentation, punitive damages are appropriate to punish Tekstrom and Minhas for their outrageous conduct of misrepresenting the contract to Savla and deliberately

threatening him with criminal action and possible deportation when they knew that there was no real basis for doing so. Such damages are also appropriate to deter them from similar conduct in the future, as they continued to use the same employment contract despite the obvious unfairness of it. Punitive damages are also appropriate regarding the claim of intentional infliction of emotional distress, because Tekstrom and Minhas willfully engaged in outrageous threats against Savla.

In assessing punitive damages against Tekstrom and Minhas, I should consider the assets of both defendants as well as their net income. Based on the income of the defendants in 2002 and 2003 as shown in their federal tax returns, as well as their current assets, and considering other factors such as the reprehensibility of their conduct, the ratio of punitive damages to compensatory damages, and sanctions for comparable conduct (*see In re Servino v. The Medical Center of Delaware*, 1997 WL 528263 (Del. Super. Aug. 1, 1997)), I award \$20,000 in punitive damages.

### **Summary**

In summary, I award Savla \$11,200.00 for unpaid wages, as well as an additional \$11,200.00 for liquidated damages under 19 Del.C. Sec. 902. I award him \$28,800.00 as compensatory damage for lost wages for the breach of covenant of fair dealing and intentional misrepresentation, and intentional infliction of emotional distress. I award Savla \$20,000.00 for pain and suffering as a result of intentional infliction of emotional distress, intentional misrepresentation, and violation of the covenant of fair dealing. Finally, I award him \$20,000.00 in punitive damages on all of his various claims. Therefore, Savla's award totals \$91,200.00 and this court has unlimited jurisdiction over counterclaims pursuant to 10 Del.C. Sec. 1322(b).

Therefore, on Tekstrom's claim, judgment is entered for Savla for the cost of these proceedings. On Savla's claim, judgment is entered in behalf of him and against Tekstrom and Minhas for the sum of \$91,200.00, plus the cost of these proceedings, prejudgment interest, and reasonable attorney's fees.

**IT IS SO ORDERED.**

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**Merrill C. Trader**  
**Judge**